UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

MUNIS, INC.,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Civil No. 02-66-P-C***
	)	
EAST ORANGE BOARD OF	***)***	
WATER COMMISSIONERS,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON DEFENDANT'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION AND IMPROPER VENUE OR, ALTERNATIVELY, TO TRANSFER VENUE

Defendant East Orange Board of Water Commissioners ("Board") moves to dismiss the instant breach-of-contract and negligent-misrepresentation action for lack of personal jurisdiction and improper venue or, alternatively, to transfer venue to the United States District Court for the District of New Jersey. Motion To Dismiss Pursuant to F.R.Civ.P(12)(b)(2) and (3) or, in the Alternative, Transfer Venue Pursuant to 28 U.S.C. 1404(a), etc. ("Motion") (Docket No. 2) at 1; Complaint, attached to Notice of Removal to United States District Court for the District of Maine (Docket No. 1), ¶¶ 22-30. For the reasons that follow, I recommend that the Motion be denied.[1]

[1] Were the alternative request to transfer venue a stand-alone motion, I would issue a memorandum decision inasmuch as such motions are non-case-dispositive. *See, e.g., McEvily v. Sunbeam-Oster Co.*, 878 F. Supp. 337, 340 (D.R.I. 1994). However, because in this case the court must first rule on the dispositive motion to dismiss before reaching the alternative request, it seems only sensible to frame the portion of my discussion dealing with transfer as a recommended decision.

I. Applicable Legal Standards

A motion to dismiss for lack of personal jurisdiction raises the question whether a defendant has "purposefully established minimum contacts in the forum State." *Hancock v. Delta Air Lines, Inc.*, 793 F. Supp. 366, 367 (D. Me. 1992) (citation and internal quotation marks omitted). The plaintiff bears the burden of establishing jurisdiction; however, where (as here) the court rules on a Rule 12(b)(2) motion without holding an evidentiary hearing, a *prima facie* showing suffices. *Archibald v. Archibald*, 826 F. Supp. 26, 28 (D. Me. 1993). Such a showing requires more than mere reference to unsupported allegations in the plaintiff's pleadings. *Boit v. Gar-Tec Prods., Inc.*, 967 F.2d 671, 675 (1st Cir. 1992). However, for purposes of considering a Rule 12(b)(2) motion the court will accept properly supported proffers of evidence as true. *Id.*

The filing of a Rule 12(b)(3) motion likewise places the burden on the plaintiff to demonstrate the propriety of venue. 5A Charles Alan Wright & Arthur M. Miller, *Federal Practice and Procedure* § 1352 at 264-65 (2d ed. 1990). As in the case of a Rule 12(b)(2) motion, the court accepts a plaintiff's properly supported proffers of evidence as true. *M.K.C. Equip. Co. v. M.A.I.L. Code, Inc.*, 843 F. Supp. 679, 682-83 (D. Kan. 1994).

Per 28 U.S.C. § 1404(a), "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." A transfer pursuant to section 1404(a) lies within the discretion of the court. *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988). The factors to be considered in the exercise of this discretion include the convenience of the parties and witnesses, the order in which jurisdiction was obtained by the district court, the availability of documents, and the possibilities of

consolidation. *Cianbro Corp. v. Curran-Lavoie, Inc.*, 814 F.2d 7, 11 (1st Cir. 1987). The fact that a prompt trial may be available in one of the districts at issue but not in the other is relevant to the inquiry. *Ashmore v. Northeast Petroleum Div. of Cargill, Inc.*, 925 F. Supp. 36, 39 (D. Me. 1996). The defendant bears "a substantial burden" of demonstrating the need for a change of forum. *Demont & Assoc. v. Berry*, 77 F. Supp.2d 171, 173 (D. Me. 1999). The evidence submitted by the defendant "must weigh heavily in favor of transfer" when this district is the plaintiff's "home forum." *Id*.

II. Factual Background

The following facts, with conflicts resolved in favor of the plaintiff's properly supported proffers of evidence, bear on the pending motion.

Plaintiff MUNIS, Inc. ("MUNIS") is a Maine corporation with its principal place of business in Falmouth, Maine. Affidavit of John S. Marr, Jr. ("Marr Aff.") (Docket No. 5) ¶ 1. MUNIS provides data-management, financial, billing and other software applications to local governments, utilities and schools nationwide. *Id*. ¶ 2.

The Board is a public body of the City of East Orange, New Jersey ("City"). Certification of Calvin Gibson in Support of Motion To Dismiss or, in the Alternative, To Transfer Venue ("First Gibson Aff.") (Docket No. 3) ¶ 2. The City is a municipal corporation incorporated under the laws of the State of New Jersey on January 1, 1909. Affidavit of Nicole M. Hanna (Docket No. 10) ¶ 2. The Board provides water services for the City as well as for the municipalities of South Orange and Orange, New Jersey. First Gibson Aff. ¶ 2. The Board serves no customer outside of New Jersey, *id*., and has never conducted any business or provided any services in Maine, *id*. ¶ 9.

In or about March 1999 MUNIS received at its Falmouth offices a request for proposals ("RFP") from the North Carolina and Massachusetts offices of Camp, Dresser & McGee ("CDM") for the provision of a suite of software applications and accompanying hardware to the Board, for whom

CDM was working as an administrator/consultant. Marr Aff. ¶ 3. The Board needed to replace its billing, accounting, payroll and other software applications because, among other reasons, they were not year 2000 ("Y2K") compliant. *Id*. ¶ 4. By the time MUNIS received the Board's RFP it had already stopped taking Y2K business. *Id*. ¶ 5. However, on behalf of the Board, CDM prevailed upon MUNIS to make an exception and submit a response to the RFP. *Id*.

The response to the RFP was prepared by MUNIS personnel in Maine and submitted in late April 1999. *Id*. ¶ 6. The Board subsequently invited MUNIS to its offices in East Orange, New Jersey to make a presentation. *Id*. Thereafter, the parties entered into contract negotiations that continued for several weeks by telephone, fax, e-mail and U.S. mail between MUNIS representatives in Maine and Board representatives in New Jersey, North Carolina and Massachusetts. *Id*. ¶ 7. The negotiations culminated in an "Agreement Between MUNIS and East Orange Board of Water Commissioners for the Purchase of Computer Hardware and the Licensing of Applications of Software Products" dated June 18, 1999 ("Agreement"). *Id*. ¶ 8. The Agreement was signed by two of the Board's commissioners in New Jersey and by MUNIS vice president William Bragdon in Maine. *Id*.[2]

Pursuant to the Agreement, MUNIS agreed to sell and the Board agreed to purchase a suite of software applications, hardware, training and maintenance and support services. *Id*. ¶ 9. The contract price was $1,745,201.34, with an option (later exercised by the Board) to purchase an HR module for $383,800, and agreed maintenance and support fees. *Id*. Payments under the Agreement were made to MUNIS in Falmouth, Maine. *Id*. The Agreement provided that it was to be governed by and construed in accordance with the laws of the state of New Jersey. First Gibson Aff. ¶ 6.

[2] According to the Board, Bragdon traveled to New Jersey to execute the Agreement. *See* First Gibson Aff. ¶ 6. I resolve this factual dispute in favor of MUNIS.

MUNIS installed the hardware and software applications called for by the Agreement at the Board's facility during the first week of August 1999. Marr Aff. ¶ 10. On October 11-13, 1999 Jennifer Ng and Michelle Thaler of CDM attended three days of training and project planning at MUNIS's Falmouth offices. Affidavit of James Mackell (Docket No. 9) ¶ 3. MUNIS also provided training to Board employees in New Jersey. First Gibson Aff. ¶ 7.

All technical and product support to which the Board was entitled pursuant to the Agreement was provided by MUNIS in Maine. Marr Aff. ¶ 11. In fact, such support is provided exclusively by MUNIS personnel located in Falmouth. Affidavit of Catherine J. McCarron (Docket No. 6) ¶ 3. According to MUNIS's records, representatives of the Board contacted MUNIS's support personnel in Falmouth on six hundred and eighty three occasions between November 15, 1999 and October 10, 2001. *Id*. ¶ 4. In addition, between July 1999 and March 2001 the Board's personnel in New Jersey and MUNIS representatives in Maine held routine conference calls to discuss project management issues. Marr Aff. ¶ 11.

During the pendency of the Agreement, many MUNIS employees traveled to New Jersey on multiple occasions to meet with Board employees, the Board's legal counsel, the mayor of the City and members of his staff and the City's corporation counsel to address ongoing problems and concerns. First Gibson Aff. ¶ 7. These included problems with administration of the contract, problems with the computer system (including transfer of data), and conflicts between MUNIS's bills and the Board's payments. Certification of Calvin Gibson in Further Support of Motion To Dismiss or, in the Alternative, To Transfer Venue ("Second Gibson Aff.") (Docket No. 12) ¶ 4. Among individuals who participated in these meetings and are likely witnesses in this matter are Robert Bowser, the City's mayor; Jason Holt and Lucas Phillips, City counsel; Soe Myint, the City's chief financial officer; Harry Mansman, Mark Pfieffer, Joseph Scranton and Mark Brodowski, employees of

the New Jersey Department of Community Affairs, Division of Local Government Services ("Division"); and Peter Nese, Robert Pennington and William Gilmore, employees of CDM, which is located in Edison, New Jersey. *Id*. ¶¶ 4-5. No Board employee or commissioner ever traveled to Maine in connection with the Board's relationship with MUNIS. First Gibson Aff. ¶ 8.

The Board quickly fell into serious arrears on its payment obligations under the Agreement. Marr Aff. ¶ 12. On several occasions during 2000 and 2001 Board representatives, including the executive director and legal counsel, represented to MUNIS personnel in Maine orally and in writing that the Board acknowledged owing money to MUNIS and desired to meet with MUNIS representatives to discuss a timetable for payment on these obligations. *Id*. In reliance upon these assurances, MUNIS continued to provide products, services and support to the Board despite its delinquent account balance. *Id*. However, in mid-2001 the Board changed its tune. *Id*. ¶ 13. At that time, it began to state that it would make payments only for the support of those applications it was actually using. *Id*. Ultimately, it did not even make these payments. *Id*. The Board owes MUNIS more than $700,000 for products and services provided pursuant to the Agreement. *Id*.

On October 4, 1999, pursuant to state law, the director of the Division ("Director") declared the City a city in fiscal distress and placed it and all of its agencies, boards and commissions, including the Board, under the authority of the Local Finance Board and the Director. Second Gibson Aff. ¶ 2. The City and the Board were thereafter subjected to significant restraints on their fiscal activities and close supervision by the Local Finance Board and the Director. *Id*. ¶ 3. As a result of this supervision, Division members became involved in most major financial decisions of the City and

its agencies. *Id*. The City was discharged from the supervision of the Division in the fall of 2001. Affidavit of Sean A. Wallace (Docket No. 15) ¶ 2.[3]

On February 13, 2002 MUNIS filed a civil action against the Board in the Superior Court of Maine, Cumberland County, alleging breach of contract by failure to pay for all of the products and services provided pursuant to the Agreement and negligent misrepresentation based on statements allegedly made concerning the Board's intention to make payment on amounts owed. First Gibson Aff. ¶ 10; Complaint ¶¶ 22-30. The Board removed the matter to this court on the basis of diversity of citizenship. First Gibson Aff. ¶ 11.

III. Discussion

A. Personal Jurisdiction

In diversity cases the exercise of personal jurisdiction over a non-resident defendant is governed by the forum state's long-arm jurisdiction statute. *American Express Int'l, Inc. v. Mendez-Capellan*, 889 F.2d 1175, 1178 (1st Cir. 1989). Maine's long-arm jurisdiction statute declares that it is to be applied "so as to assert jurisdiction over nonresident defendants to the fullest extent permitted by the due process clause of the United States Constitution, 14th amendment." 14 M.R.S.A. § 704-A(1). Therefore, on a motion to dismiss for lack of personal jurisdiction, this court's inquiry focuses on whether the assertion of jurisdiction violates due process. *See, e.g., Archibald*, 826 F. Supp. at 29.

[3] To counter this point, the Board submits an affidavit of attorney Stefani C Schwartz indicating that the Wallace affidavit is misleading. Certification of Stefani C Schwartz, Esq. in Support of the Defendant's Application and in Opposition to the Affadavit [sic] of Sean A. Wallace ("Schwartz Aff.") (Docket No. 16). According to Schwartz, Division supervision was indeed discontinued pursuant to one New Jersey law, N.J.S.A. 52:27BB-1, *et seq*., but continues pursuant to another, N.J.S.A. 52:27D-118.25, *et seq*. *Id*. ¶ 3. Schwartz appends a Local Finance Board resolution in support of this proposition, but that document merely establishes that the City was under Division supervision effective July 12, 2000 – not that supervision continues to this day. *See* Exh. A to *id*. Thus, Schwartz merely disputes the Wallace information; she does not conclusively establish that it is wrong. For purposes of the Rule 12(b)(2) and 12(b)(3) motions, I must accept MUNIS's conflicting evidence (the Wallace version) as true.

A court may have general or specific personal jurisdiction over the defendants in an action. General jurisdiction arises when the defendant has engaged in substantial or systematic and continuous activity, unrelated to the subject matter of the action, in the forum state. *Scott v. Jones*, 984 F. Supp. 37, 43 (D. Me. 1997). Specific jurisdiction is based on a relationship between the forum and the particular acts or injuries that provide the basis for the action, that is, "where the cause of action arises directly out of, or relates to, the defendant's forum-based contacts." *United Elec., Radio & Mach. Workers of Am. v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1088-89 (1st Cir. 1992). The Maine long-arm statute provides only for the exercise of specific jurisdiction, *Lorelei Corp. v. County of Guadalupe*, 940 F.2d 717, 720 (1st Cir. 1991), and MUNIS presses no claim that general jurisdiction exists, *see* Plaintiff's Memorandum in Opposition to Defendant's Motion To Dismiss or, in the Alternative, To Transfer ("Opposition") (Docket No. 4) at 5.

The First Circuit has developed the following test to evaluate the appropriateness of the exercise of specific jurisdiction:

> First, the claim underlying the litigation must directly arise out of, or relate to, the defendant's forum-state activities. Second, the defendant's in-state contacts must represent a purposeful availment of the privilege of conducting activities in the forum state, thereby invoking the benefits and protections of that state's laws and making the defendant's involuntary presence before the state's courts foreseeable. Third, the exercise of jurisdiction must, in light of the Gestalt factors, be reasonable.

163 Pleasant St., 960 F.2d at 1089. The "Gestalt factors" comprise

> (1) the defendant's burden of appearing, (2) the forum state's interest in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the judicial system's interest in obtaining the most effective resolution of the controversy, and (5) the common interests of all sovereigns in promoting substantive social policies.

Id. at 1088. Once the plaintiff makes a *prima facie* showing of relatedness and minimum contacts/purposeful availment, the burden shifts to the defendant to convince the court that the Gestalt

factors militate against the exercise of jurisdiction. *Coolidge v. Judith Gap Lumber Co.*, 808 F. Supp. 889, 891 (D.Me.1992); *see also Foster-Miller, Inc. v. Babcock & Wilcox Canada,* 46 F.3d 138, 145 (1st Cir. 1995) (plaintiff "must carry the devoir of persuasion on the elements of relatedness and minimum contacts") (citations omitted).

1. Relatedness

In analyzing "relatedness" with respect to contract causes of action, a court "must look to the elements of the cause of action and ask whether the defendant's contacts with the forum were instrumental either in the formation of the contract or in its breach." *Phillips Exeter Acad. v. Howard Phillips Fund, Inc*., 196 F.3d 284, 289 (1st Cir. 1999). Lack of physical presence within the forum is not dispositive; "[t]he transmission of information into [the forum state] by way of telephone or mail is unquestionably a contact for purposes of [personal jurisdiction] analysis." *Scott*, 984 F. Supp. at 44 (citation and internal quotation marks omitted).

"[A] contract arguably is breached where a promisor fails to perform[.]" Phillips, 196 F.3d at 291. "Indeed, courts repeatedly have held that the location where payments are due under a contract is a meaningful datum for jurisdictional purposes." *Id*. Here, payments were due at MUNIS's offices in Falmouth, Maine. While "that fact alone does not possess decretory significance[,]" *id*., other factors in this case militate in favor of a finding of "relatedness" to the alleged breach of contract, including the fact that a piece of the package the Board purchased – technical support – was provided from Maine. *Compare, e.g*., *Telford Aviation, Inc. v. Raycom Nat'l, Inc*., 122 F. Supp.2d 44, 47 (D. Me. 2000) (none of air-charter services that were subject of contract involved flights to or from Maine). In addition, the Board's contacts with the forum fairly can be said to have been "instrumental" in formation of the Agreement. The Board, through its agent CDM, contacted MUNIS in Maine and prevailed upon it to submit a proposal for a Y2K-compliant computer system.

Negotiations ensued, during which Board representatives communicated with MUNIS in Maine via fax, e-mail, telephone and U.S. mail. For all of these reasons, the contract-based cause of action relates to the Board's forum-state activities.

"The relatedness inquiry for tort claims focuses on whether the defendant's *in-forum* conduct caused the injury or gave rise to the cause of action." *United States v. Swiss Am. Bank, Ltd.*, 274 F.3d 610, 622 (1st Cir. 2001) (emphasis in original). In this case, Board representatives communicated the alleged misrepresentations orally and in writing to MUNIS in Maine, giving rise to the cause of action. These alleged misrepresentations amounted to "in-forum conduct," notwithstanding the fact that no Board representative was then physically present in Maine. *See, e.g., Phillips*, 196 F.3d at 290 ("to be constitutionally significant, forum-state contacts need not involve physical presence").

2. Purposeful Availment

This court has observed that "[a]lthough mere awareness that one's product (or financial payment) will end up in the forum state is not enough to foresee being subject to jurisdiction there, nevertheless, targeting and initiating an ongoing business relationship with a Maine company evinces an intent to avail oneself of the benefits of the forum state, including participation in the market and access to its courts." *Forum Fin. Group v. President & Fellows of Harvard Coll.*, 173 F. Supp.2d 72, 90 (D. Me. 2001). This well describes what happened in this case. The Board contacted MUNIS in Maine and prevailed on it to submit a proposal for a sizable job entailing revamping of, and ongoing technical support for, the Board's computer systems.

In the process of negotiating the Agreement, a number of communications flowed to and from MUNIS in Maine via phone, fax, e-mail and regular mail. Following execution of the Agreement, two CDM employees acting as agents for the Board traveled to Maine for three days of training. The Agreement clearly contemplated an ongoing business relationship, entailing among other things the

provision of technical-support services from MUNIS's Falmouth, Maine offices. In fact, Board personnel ended up contacting the MUNIS technical-support staff in Maine more than six hundred times. This was purposeful availment. Despite the Board's minimal physical presence in Maine (solely via a three-day training for the two CDM agents) and its lack of other business dealings here, its involuntary presence before the courts of this state was foreseeable. *See, e.g., Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A.*, No. 01-2595, slip op. at 42 (1st Cir. May 10, 2002) ("Even in cases where the defendant was not physically present in the forum, where the defendant initiated the transaction by mailing or calling the plaintiff in the forum and when the defendant contemplated that the plaintiff would render services in the forum, . . . many courts have found jurisdiction.").[4]

3. Reasonableness

"The purpose of the gestalt factors is to aid the court in achieving substantial justice, particularly where the minimum contacts question is very close. In such cases, the gestalt factors may tip the constitutional balance." *Nowak v. Tak How Invs., Ltd.*, 94 F.3d 708, 717 (1st Cir. 1996). The minimum contacts question in this case is not close. Moreover, the Board's arguments that the Gestalt factors weigh in its favor, which I address *seriatim*, generally lack force:

1. Burden of appearance: That the burden on the Board of appearing in court in Maine is substantial inasmuch as it is a local public entity that relies on taxpayer funding and conducts no business in Maine. Motion at 6. "[T]he concept of burden is inherently relative, and, insofar as

[4] *Telford*, on which the Board heavily relies, *see* Motion at 6; Reply Brief in Further Support of the East Orange Board of Water Commissioner's [sic] Motion To Dismiss the Complaint or, in the Alternative, To Transfer Venue ("Reply") (Docket No. 11) at 4-5, is distinguishable in that the defendant in that case initially sought out Telford in Alabama, whereupon it was directed to contact Telford's offices in Maine, and none of the air-charter services rendered pursuant to their contract involved flights to or from Maine, *see Telford*, 122 F. Supp.2d at 47.

staging a defense in a foreign jurisdiction is almost always inconvenient and/or costly . . . this factor is only meaningful where a party can demonstrate some kind of special or unusual burden." *Pritzker v. Yari*, 42 F.3d 53, 64 (1st Cir. 1994); *see also, e.g., Smirz v. Fred C. Gloeckner & Co.*, 732 F. Supp. 1205, 1208 (D. Me. 1990) (defendant who purposefully directs activities toward Maine shoulders burden of providing compelling evidence why exercise of jurisdiction would be unreasonable). The Board does not cite, nor can I find, caselaw holding that a defendant's status as a municipality inherently establishes a special or unusual burden. Nor does the Board otherwise demonstrate how this is so.[5]

2. Interest of the forum: That "Maine has little interest in adjudicating this dispute since, by the terms of the Agreement, it will be decided pursuant to New Jersey law." Motion at 6. As to this factor, the court's "task is not to compare the interest of the two sovereigns . . . but to determine whether the forum state *has* an interest." *Nowak*, 94 F.3d at 718 (emphasis in original). Maine has an interest in providing "a convenient forum for its residents to redress injuries inflicted by out-of-forum actors." *Daynard*, slip op. at 43 (citation and internal quotation marks omitted).

3. Plaintiff's convenience: That "MUNIS is familiar with New Jersey due to its multiple contacts" there. Motion at 6-7. While this may so, a court "must accord deference to [a plaintiff's] choice of . . . forum." *Nowak*, 94 F.3d at 718.

4. Administration of justice: That Maine's interest in obtaining the most effective resolution of this controversy would not be served by litigating in Maine's courts or enforcing any judgment entered against the Board. Motion at 7. "Usually this factor is a wash," *Nowak*, 94 F.3d at 718, and the Board provides no reason to find otherwise in this case.

[5] Even assuming *arguendo* that I were to credit the Board's assertion that it remains under supervision of the Division, the result would (*continued on next page*)

5. Pertinent policy arguments: That Maine should be encouraging a policy of adjudicating disputes in the state in which all activity relevant to the dispute is conducted and whose laws are to apply. Motion at 7. This "factor addresses the interests of the affected governments in substantive social policies." *Nowak*, 94 F.3d at 719. The Board's premise that "all" activity relevant to this dispute occurred in New Jersey is simply wrong. In addition, the fact that New Jersey law applies is not a significant social policy concern. *See, e.g., id*. at 720-21 (ascribing "little weight," as matter of public interest in *forum non conveniens* analysis, to fact that choice-of-law rules obliged Massachusetts court to apply Hong Kong law; noting that "the task of deciding foreign law [is] a chore federal courts must often perform.") (citations and internal quotation marks omitted).

In this case, consideration of the Gestalt factors as a whole does not counsel against this court's exercise of personal jurisdiction over the Board. Particularly in view of MUNIS's strong showing on the relatedness and purposeful-availment fronts, the Gestalt factors do not tip the constitutional balance in the Board's favor.

B. Propriety of Venue

In a diversity case such as this, venue is proper, *inter alia*, in "a judicial district where any defendant resides, if all defendants reside in the same State" and in "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred[.]" 28 U.S.C. § 1391(a). MUNIS argues that venue is proper here on both bases, noting that for venue purposes a corporation is deemed to "reside" in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced. Opposition at 11-12; *see also* 28 U.S.C. § 1391(c).

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not be different. The Board provides no detail concerning the impact of this status on its ability to litigate this case in Maine.

On the first point, the Board does not contest that it properly is described as a "corporation" for purposes of section 1391(c). *See generally* Reply. In fact, it describes itself as "a semi-autonomous corporation of a New Jersey municipality[.]" Motion at 8. Inasmuch as the Board is subject to personal jurisdiction in Maine, it is deemed to "reside" here for purposes of section 1391(a). Venue accordingly is proper.

In any event, as MUNIS argues, "a substantial part of the events or omissions" giving rise to the instant claims occurred in Maine. *See* Opposition at 11-12. The "substantial part" test asks "whether the district the plaintiff chose had a substantial connection to the claim, whether or not other forums had greater contacts[.]" *Uffner v. La Reunion Francaise, S.A.*, 244 F.3d 38, 42 (1st Cir. 2001) (citations and internal quotation marks omitted). For the same reasons that Maine's connection to the contract and tort claims in issue passes the "relatedness" test for purposes of personal jurisdiction, it passes the "substantial part" test for purposes of venue. *See Figgie Int'l, Inc. v. Destileria Serralles, Inc.*, 925 F. Supp. 411, 412-13 (D.S.C. 1996) (noting, in finding venue proper in South Carolina, that plaintiff/seller's "base of operations for the negotiation of the contract and for the coordination of the engineering, manufacturing, and shipping of the bottling equipment took place in Charlestown, South Carolina.").

C. Discretionary Transfer of Venue

The evidence submitted by a defendant seeking transfer pursuant to 28 U.S.C. § 1404(a) "must weigh heavily in favor of transfer" when the forum in question is the plaintiff's "home forum." *Demont*, 77 F. Supp.2d at 173. The Board's arguments, which I address *seriatim*, are not sufficiently weighty to displace MUNIS's choice of forum:

1. Convenience and relative financial strength of parties: That inasmuch as MUNIS employees traveled regularly to New Jersey in connection with the Agreement, it is "clear" that they

would not be inconvenienced in litigating the case there, whereas the Board would be "severely inconvenienced" by litigating in this forum because it is a public entity dependent on taxpayer funds. Motion at 9. Neither proposition is persuasive. As MUNIS points out with respect to its own convenience, Opposition at 12-13, there is a distinction between travel on business (for which an entity expects to be paid) and travel to attend to litigation. As to the Board's convenience, it is not self-evident that a municipal defendant necessarily endures greater hardship or inconvenience than a private one. *Compare, e.g., Aquatic Amusement Assocs., Ltd. v. Walt Disney World Co.*, 734 F. Supp. 54, 59 (N.D.N.Y. 1990) ("this factor is usually only applicable to situations where an individual is suing a large corporation").

The Board adds, in its reply memorandum, that its relative financial weakness stemming from its "distressed" status should also weigh in the balance. Reply at 6. As discussed above, there is no clear-cut evidence that the City remains in distress (*i.e.*, continues under Division supervision). However, even assuming *arguendo* that this status continues, the Board does not adduce concrete evidence that this receivership-like state prevents it from absorbing litigation costs and, ultimately, passing them on to taxpayers as a cost of doing business. *See Anderson v. Century Prods. Co.*, 943 F. Supp. 137, 148-49 (D.N.H. 1996) (noting, in finding corporation better able to absorb costs of litigation than individual, "In today's business world, the expense of defending lawsuits, both meritorious and nonmeritorious, is an inevitable, yet unfortunate, cost of doing business which can, in turn, be defrayed by passing it on to the ultimate consumer."). Transfer will not be ordered "if the result is merely to shift the inconvenience from one party to the other." *Banjo Buddies, Inc. v. Renosky*, 156 F. Supp.2d 22, 26 (D. Me. 2001) (citation and internal quotation marks omitted).

2. Location of evidence: That all documentation regarding the computer system (the proper functioning of which likely will be in question in this case) is located in the Board's offices in

New Jersey, and any experts retained to address the functioning of that system would need to investigate it there. Motion at 10. No detail is provided concerning specific documents that might be at issue in this case or experts who may be called. "[A]morphous allegations of inconvenience regarding unspecified documents, as with unnamed witnesses, are inadequate to satisfy the required clear showing of balancing of conveniences[.]" *Ashmore*, 925 F. Supp. at 39.

3. Convenience, availability of witnesses: That a number of third-party witnesses who reside in New Jersey would be inconvenienced by having to travel to Maine to testify and are beyond the reach of this court's subpoena power, as a result of which their testimony might be impossible to compel. Motion at 10. These witnesses, whose identity the Board supplied only after MUNIS pointed out that it had failed to do so, Opposition at 13; Reply at 6; Second Gibson Aff. ¶¶ 4-5, fairly can be characterized as employees or agents of the City or the state of New Jersey, *see* Reply at 6; Second Gibson Aff. ¶ 4. Even taking this belated listing into account, the Board still falls short of showing that this factor militates in its favor. Witness inconvenience is not in itself a sufficient basis on which to upset a plaintiff's choice of forum. *See, e.g., Demont*, 77 F. Supp.2d at 174 ("While it would undoubtedly be more convenient for Defendant – and many of the witnesses – if this action were tried in Vermont, more is required before this Court will disturb Plaintiff's choice of this forum.").

As to witness availability, the Board still fails to provide sufficient detail to enable the court to discern which witnesses are critical and why. "The party seeking the transfer must clearly specify the key witnesses to be called and must make a general statement of what their testimony will cover. . . . If a party has merely made a general allegation that witnesses will be necessary, without identifying them and indicating what their testimony will be the application for transfer will be denied." 15 Charles Alan Wright *et al*., *Federal Practice and Procedure* § 3851 at 425, 427-28 (2d ed. 1986) (footnote omitted). The Board explains that all of the listed witnesses participated in meetings on

various Agreement-related topics but fails to illuminate the expected testimony of any individual. *See* Second Gibson Aff. ¶ 4.

In any event, it is not clear that use of the court's subpoena powers would be necessary. The seven listed witnesses who are City employees or agents (including CDM employees) fairly can be said to be within the Board's control. *See, e.g., Idlewild Creek Ltd. P'ship v. Travelers Prop. Cas.*, 2000 WL 1717566, at *2 (D. Me. 2000) ("Of the witnesses listed, two are employees of the defendant and two are consultants to the defendant. Such witnesses must be deemed to be within the defendant's control for purposes of a section 1404(a) analysis; they may be physically located outside the 100-mile limit for service of subpoenas imposed by Fed.R.Civ.P. 45(b)(2), but the fact that they are not within the range of this court's subpoena power is irrelevant when they are within the defendant's control."). There is nothing to indicate that the testimony of the four remaining listed witnesses (state employees) is critical, in the sense that it is different in kind or quality from that of the other seven witnesses who sat in at the same meetings.

4. Relative congestion of dockets. That MUNIS errs in asserting that trial would be significantly speedier in this district than in the District of New Jersey. Reply at 6-7. MUNIS points to statistics showing that during the twelve-month period ending September 30, 2001 the median time interval from filing to trial in this court was twelve months, whereas the median filing-to-trial interval in the District of New Jersey was thirty-two months. Opposition at 14; Exh. A to *id*. at 1. The Board counters that the median time interval from filing to disposition for all cases (not just those involving court action) was 6.8 months in Maine versus 7.5 months in New Jersey. Reply at 7; Exh. A to Opposition at 1. Even the more favorable statistic does not assist the Board. Whether by a wide or slim margin, this is the faster docket, a factor militating against transfer.

The evidence submitted by the Board, considered as a whole, falls short of weighing heavily in favor of transfer.

IV. Conclusion

For the foregoing reasons, I recommend that the Motion be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 31st day of May, 2002.

_____
David M. Cohen
United States Magistrate Judge

STNDRD

U.S. District Court
District of Maine (Portland)

CIVIL DOCKET FOR CASE #: 02-CV-66

MUNIS INC v. EAST ORANGE BOARD OF Filed: 03/25/02
Assigned to: JUDGE GENE CARTER
Demand: $786,000 Nature of Suit: 190
Lead Docket: None Jurisdiction: Diversity
Dkt # in Cumberland Superior : is 02-cv-63

Cause: 28:1332 Diversity-Notice of Removal

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v.

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